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No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ROCKET OIL COMPANY,
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION
and DEPOSIT INSURANCE NATIONAL BANK
OF OKLAHOMA CITY, OKLAHOMA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December, 1985

QUESTIONS PRESENTED

1. Whether the National Bank Act preempts the provisions of the Uniform Commercial Code governing check deposits, collections, and payments performed by a national bank created under the Federal Deposit Insurance Act?

2. Whether the National Bank Act displaces the rules of federal commercial law announced by this Court as to a national bank created under the Federal Deposit Insurance Act?

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OPINION BELOW

The opinion of the court of appeals (App. pp. 4a-9a) is reported at 769 F.2d 658. The September 4, 1984 opinion of the district court (App. pp. 10a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1985. A timely petition for rehearing was denied on September 17, 1985. A stay of mandate pending certiorari was granted on October 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, cl.2 of the Constitution provides in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land. . . ."

12 U.S.C. §194 provides:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

12 U.S.C. § 1813(1)(4) provides, in relevant part:

"(1) The term 'deposit' means —

"(4) outstanding draft (including advice or authorization to charge bank's balance in another bank), cashier's check, money order, or other officer's check issued in the usual course of business for any purpose, including, without being limited to, those issued in payment for services, dividends, or purchases,"

12 U.S.C. §1821(h) provides in relevant part:

"As soon as possible after the closing of an insured bank, the Corporation, if it finds that it is advisable

and in the interest of the depositors of the closed bank or the public, shall organize a new national bank to assume the insured deposits of such closed bank and otherwise to perform temporarily the functions hereinafter provided for. The new bank shall have its place of business in the same community as the closed bank."

12 U.S.C. §1821(i) provides in relevant part:

"The articles of association and the organization certificate of the new bank shall be executed by representatives designated by the Corporation. No capital stock need be paid in by the Corporation. The new bank shall not have a board of directors, but shall be managed by an executive officer appointed by the Board of Directors of the Corporation who shall be subject to its directions. In all other respects the new bank shall be organized in accordance with the then existing provisions of law relating to the organization of national banking associations. The new bank may with the approval of the Corporation, accept new deposits which shall be subject to withdrawal on demand and which, except where the new bank is the only bank in the community, shall not exceed $100,000 from any depositor. The new bank, without application to or approval by the Corporation, shall be an insured bank and shall maintain on deposit with the Federal Reserve Bank of its district reserves in the amount required by law for member banks, but it shall not be required to subscribe for stock of the Federal Reserve Bank. Funds of the new bank shall be kept on hand in cash, invested in obligations of the United States, or in obligations guaranteed as to principal and interest by the United States, or deposited with the Corporation, with a Federal Reserve bank, or, to the extent of the insurance coverage thereon, with an insured bank. The new

bank, unless otherwise authorized by the Comptroller of the Currency, shall transact no business except that authorized by this chapter and as may be incidental to its organization. Notwithstanding any other provision of law the new bank, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority."

12 U.S.C. §1821(j) provides in relevant part:

"Upon the organization of a new bank, the Corporation shall promptly make available to it an amount equal to the estimated insured deposits of such closed bank plus the estimated amount of the expenses of operating the new bank, and shall determine as soon as possible the amount due each depositor for his insured deposit in the closed bank, and the total expenses of operation of the new bank. Upon such determination, the amounts so estimated and made available shall be adjusted to conform to the amounts so determined. Earnings of the new bank shall be paid over or credited to the Corporation in such adjustment. If any new bank, during the period it continues its status as such, sustains any losses with respect to which it is not effectively protected except by reason of being an insured bank, the Corporation shall furnish to it additional funds in the amount of such losses. The new bank shall assume as transferred deposits the payment of the insured deposits of such closed bank to each of its depositors. Of the amounts so made available, the Corporation shall transfer to the new bank, in cash, such sums as may be necessary to enable it to meet its expenses of operation and immediate cash demands on such transferred deposits, and the remainder of such amounts shall be subject to withdrawal by the new bank on demand."

Section 3-418 of the Uniform Commercial Code provides:

"Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment. Laws 1961, p.114, §3-418."

Section 4-213 of the Uniform Commercial Code provides in relevant part:

"(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

"(b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or

"(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

"(d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

"Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item."

INTRODUCTION

Rocket Oil Company, the payee of a 1.5 million dollar cashier's check issued by Penn Square Bank, N.A. of Oklahoma City (Penn Square) and paid, after Penn Square's insolvency, by Deposit Insurance National Bank, petitions for a writ of certiorari to review the holdings of the United States Court of Appeals for the Tenth Circuit that (1) principles of federal preemption preclude application of the rules of law contained in the Uniform Commercial Code to Deposit Insurance National Bank because that bank was created under the Federal Deposit Insurance Act as the successor to an insolvent national bank, and (2) the National Bank Act supercedes the rules of commercial law which this Court has held are part of the federal common law of commercial transactions.

STATEMENT

Rocket Oil Company had on deposit in Penn Square a certificate of deposit in the amount of 1.5 million dollars. On July 2, 1982, Rocket redeemed its certificate of deposit and received the proceeds in the form of a Penn Square cashier's check. Rocket deposited the cashier's check in its corporate bank account, and Rocket's bank sent the cashier's check forward for collection.

On July 5, 1982, the Comptroller of the Currency declared Penn Square insolvent. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver pursuant to 12 U.S.C. §1821(c). FDIC then created and funded a new national bank, Deposit Insurance National Bank (DINB), with "assets transferred from the FDIC's Permanent Insur-

ance Fund to DINB." App. p. 21a. *See*, 12 U.S.C. §1821(h)-(j). On July 6, 1982, DINB made final payment of the cashier's check without question or complaint "as part of the normal collection process." App. p. 15a.

It is undisputed that Rocket had no knowledge of Penn Square's impending failure and that Rocket was a good faith holder in due course. App. p. 8a and p. 18a. Moreover, it will be undisputed in this Court that no assets of the estate of Penn Square were employed to effect final payment of the cashier's check. Rather, as noted, payment was made by DINB out of assets transferred to it from the FDIC Permanent Insurance Fund.[1] Months thereafter, notwithstanding the final payment, FDIC and DINB brought an action against Rocket claiming that DINB had effected that payment "through error and mistake."

The United States District Court for the Western District of Oklahoma granted Rocket's motion for summary judgment.[2] The court explained that since it was undisputed Rocket had no inkling of Penn Square's impending failure there could be no claim that Rocket was attempting to obtain a preference over other Penn Square depositors. App. pp. 18a and n.3. The court reeasoned that because Rocket was a holder in due course and because final pay-

[1] The court of appeals clearly failed to apprehend this fact. Reading its opinion, one would believe DINB had used assets of Penn Square to complete final payment of the check. This, as the district court found from undisputed facts, is simply not true.

[2] The district court also granted motions for summary judgment of All Soul's Episcopal Church, Pauline McKnight, and Pauline Oil and Gas Company, whose cases had been consolidated with the action against Rocket.

ment had unquestionably been completed, FDIC's[3] action was barred by the final payment rule codified in §4-213(1) of the Uniform Commercial Code and long held by this Court to apply to agencies of the federal government as a matter of federal common law. App. pp. 21a-22a. The court agreed that a different result might obtain if assets of Penn Square itself had been paid to Rocket. It held, however, that since payment here was made out of the assets

> "transferred from the FDIC's Permanent Insurance Fund to DINB . . . no federal statutes or . . . judicial decisions . . . preclude the assertion of the final payment rule . . .; quite the contrary, the FDIC as an agency of the United States is to be treated as any other party,"

Id., *citing*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943).

The court of appeals reversed. The reversal was premised on the belief that Rocket's "rights and liabilities" were "fixed by the National Bank Act" which "takes precedence over state law" and which rendered "[a]pplication of the final payment rule . . . erroneous . . ." The court of appeals was apparently of the view that 12 U.S.C. §§194 or 1813 required this result. The court of appeals did not even discuss the decisions of this Court holding that the final payment rule applies to agencies of the federal government as a matter of federal common law upon which the district court had relied. Nor did the court attempt to reconcile its holding that the closing of Penn Square "cast in stone" Rocket's "rights and liabilities" with the decision of another panel of the Tenth Circuit that events occurring after

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[3] References to FDIC include DINB.

Penn Square closed should be considered in determining the rights of the parties. *Philadelphia Gear Corporation* v. *FDIC*, 751 F.2d 1131 (10th Cir.) *cert. granted*, No. 84-1972 (October 6, 1985).

REASONS FOR GRANTING THE WRIT

The sweeping holding of the court of appeals that the general language of the National Bank Act precludes application of rules of law drawn from either the Uniform Commercial Code or the federal common law to DINB, a national bank created under the special authority granted by 12 U.S.C. §1821, disregards both fundamental tenets of Supremacy Clause analysis and the purpose of Congress in granting to FDIC the power to create and fund a national bank such as DINB. The decision also creates an unnecessary conflict between the National Bank Act and the decisions of this Court that basic precepts of commercial law — including particularly the final payment rule which FDIC seeks to evade here — apply to agencies of the federal government as a matter of *federal* common law. Indeed, the judgment below goes far toward relegating all those who are forced to deal with FDIC after the failure of a national bank to the status which they would have if FDIC did not exist and a receiver had simply locked the doors of a failed bank and walked away. Such a result will inject justifiable apprehension into the minds of depositors whose concerns Congress created FDIC to allay. It will have immediate and far reaching effects not only upon the ongoing receivership of Penn Square, *cf.*, *FDIC* v. *Philadelphia Gear Corporation*, *supra*, but upon all those who must deal with FDIC in all other bank failures throughout the

United States, a number which, as FDIC has very recently advised the Court, is both significant and growing.[4]

1. Certiorari Should Be Granted Because the Decision Below Conflicts With Decisions of This Court on the Issue of Federal Preemption of State Commercial Law.

The holding of the court of appeals that some unspecified provision of "the National Bank Act . . . takes precedence over state law" and, therefore, renders inapplicable the provisions of the Uniform Commercial Code dealing with the effect of final payment by a national bank is repugnant to this Court's holdings as to the relationship between the Supremacy Clause of the Constitution and state commercial codes. *See especially, United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). The extent to which the court of appeals departed from the teachings of this Court is rendered strikingly clear when it is remembered that no rule of banking or commercial law is more firmly settled than the precept that final payment of a check — especially a cashier's check — in favor of a holder in due course can *never* be reversed. The rule is premised upon the necessity for certainty and finality. It places upon the bank the duty to determine, once and for all, whether to pay a check to a good faith holder. The rule has been repeatedly held by this Court to apply against all agencies of the federal government, *see, e.g., United States* v. *National Exchange Bank*, 270 U.S. 527, 534 (1926), and has been codified in

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[4] In its petition for certiorari in *Philadelphia Gear*, FDIC advised the Court (p. 19, n.12) that "in the years 1982-1984 there were 179 bank failures in the United States. Through mid-June, there were 47 bank failures in 1985."

the Uniform Commercial Code adopted in forty-nine of the fifty states as well as by Congress for the District of Columbia.

It is undisputed that application of the final payment rule in this case results in a judgment in favor of Rocket. The court of appeals held, however, that since this action was brought by FDIC and DINB, the National Bank Act took precedence over the Uniform Commercial Code and precluded application of the final payment rule.

Declaring that because "the National Bank Act provides for liquidation of an insolvent national bank, payment of the debts of Penn Square following insolvency had to be made in compliance with the National Bank Act, not the Uniform Commercial Code", the court of appeals reversed the district court's ruling that the final payment rule applied to FDIC and DINB.

The flaws in the analysis of the court of appeals are obvious and severe.

First, no question of "payment of the debts *of Penn Square*" is at issue here. Final payment was, as the district court found on undisputed facts, made by DINB "out of assets transferred from the FDIC's Permanent Insurance Fund to DINB," not out of the assets of Penn Square. (App. p. 21a). FDIC had transferred these funds to DINB as part of FDIC's decision to create and fund DINB as a *new* national bank. It was that new national bank that made final payment of Rocket's check and that bank did so with its own, not Penn Square's, funds. There is no warrant in statute or precedent for the refusal of the court below to apply the normal rules of commercial law to

DINB merely because it was created by FDIC. Quite the contrary. In this case, as in *United States* v. *Brosnan*, 363 U.S. 237, 241-42 (1960), when Congress granted to FDIC the power to create and fund a national bank such as DINB "it came into an area of complex . . . relationships long since settled and regulated by state law", an area in which "[d]isplacing well established state procedures . . . or superimposing on them a new federal rule" would result in "severe dislocation" of established business and commercial norms. The *Brosnan* rationale was, in fact, echoed in the reasoning of the district court below. It held:

> "When the FDIC organized DINB to make available the insured deposits of Penn Square after the Bank had failed, they assumed a host of duties. In particular, they stepped into the complex and arcane world of bank collections, for when the Bank failed, there were surely myriad items being processed. . . .
>
> "Therefore, the salient issue is at what point in those processes an item has progressed far enough that it should be completed, instead of being sent back and reversing all the steps in those processes. That point is final payment. . . ." (App. p. 22a)

The importance of the error attendant to reversing this carefully considered holding is particularly clear in this case.

In its previous decisions the Court has been especially chary of creating a discordant rule applicable only to an arbitrarily selected class of transactions to which a federal agency is a party out of nothing more than general statutory language when the normal rule is one which was "well established" at common law and which is a "commercial rule of general applicability". *Kimbell Foods*, *supra*, at

734, n.37, 739. Each of these criteria apply without question here. The final payment rule has been a part of the common law since Lord Mansfield's decision in *Price* v. *Neal*, 3 Burr. 1354, 97 Eng.Rep. 71 (1762). Indeed, prior to the decision of the court of appeals below, there was no reported opinion of any American court *ever* declining to apply it absent proof of fraud or bad faith on the part of a payee. And it is patent that Congress has not determined to excuse compliance by FDIC with normal rules of banking law in its handling of negotiable instruments. There is not a word in either the text or the history of either the National Bank Act or the Federal Deposit Insurance Act even hinting at such a result.[5] Surely, then, this is the paridigmatic instance in which since " 'the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important but still small in relation to the total, consisting of transactions with the United States.' " *Kimbell Foods*, *supra*, 440 U.S. at 732, n.28, *quoting*, *United States* v. *Wegematic Corp.*, 360 F.2d 674, 676 (2d Cir. 1966) (Friendly, J.).

The belief of the court below that a unique rule should apply to a federal agency which happens to be functioning as a receiver is both incorrect[6] and contrary to the decisions

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[5] When Congress *did* intend to exempt FDIC from accepted rules of law, it had no difficulty in saying so. Thus, 12 U.S.C. §1823(e) provides that under certain circumstances oral agreements enforcible between a bank and its customer may be avoided by FDIC.

[6] The belief is unfounded in fact. FDIC is serving as receiver of Penn Square; DINB, the entity which effected final payment is not. It is operating, by command of 12 U.S.C. §1821(h)-(j) as a national bank.

of other courts of appeal. For example, the Sixth Circuit has very recently held that the rights and liabilities of the National Credit Union Administration, suing as receiver for a failed credit union, are to be "decided in accordance with the provisions of the Uniform Commercial Code." *National Credit Union Administration* v. *Michigan National Bank*, 771 F.2d 154, 158 (6th Cir. 1985). Yet there is no material difference between the rights and powers which the National Credit Union Act, 12 U.S.C. §§1781-1789, grants to the Administration as receiver of a failed credit union and the rights and powers which the Federal Deposit Insurance Act grants to FDIC. Indeed, the relevant sections of the two Acts are virtually identical. *Compare*, 12 U.S.C. §1821 *with*, 12 U.S.C. §1787.

Second, it is apparent that nothing said by the court of appeals justifies its holding that the final payment rule is preempted by either the National Bank Act or the Federal Deposit Insurance Act. The court's reasoning might or might not be relevant if FDIC, acting through DINB, had declined to pay any cashier's checks at all. But the important question presented here is whether, *after* having finally paid such checks, FDIC could seek "restitution" as to the completed transactions on a claim of "error or mistake." The affirmative answer given by the court of appeals below ignores two centuries of settled law and represents an invocation of a concept of "preemption" of state commercial law which has no support in the decisions of this Court. The reverse is true. The Court has more than once said that its "guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must be specifically shown" before state laws of

general applicability will be held to be preempted. *Wallis* v. *Pan American Petroleum Corporation*, 384 U.S. 63, 68 (1966). The holding below that such a conflict exists is plainly wrong. And the error is one which, absent correction here, will continue to be repeated in all of the hundreds of cases arising from the receivership of Penn Square which are pending in, or will ultimately be adjudicated by, the Tenth Circuit. *See, FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972, *supra*, petition for certiorari pp. 7, 18-19 (FDIC seeks certiorari because holding of Tenth Circuit as to status of one standby letter of credit issued by Penn Square will be applied to all such letters of credit).

2. Certiorari Should Be Granted Because the Decision Below Conflicts With Decisions of This Court Holding That the Final Payment Rule Is Applicable to Agencies of the Federal Government.

Apart from any question of preemption of state law, certiorari should be granted here because the holding of the court of appeals that the final payment rule does not apply to FDIC or DINB is contrary to controlling decisions of the Court that "the United States as drawee of commercial paper stands in no different light than any other drawee." *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943).

Indeed, the Court has held for a century and a half that an agency of the government cannot evade application of the final payment rule by contending that final payment of a negotiable instrument was effected by the error of a federal employee acting in excess of his statutory authority. *Bank of the United States* v. *Bank of Georgia*, 10 Wheat. 233 (1824); *United States* v. *Chase Manhattan Bank*, 252

U.S. 45 (1920); *United States* v. *National Exchange Bank*, 270 U.S. 527 (1926); *see also, Clearfield Trust, supra.*

In *National Exchange Bank*, Justice Holmes explained the reason for the Court's insistence that the rule of *Price* v. *Neal* applies to the government: "The United States does business on business terms. . . . The United States is not excepted from the general rule [of Price v. Neal] by the largeness of its dealings." 270 U.S., at 534. *Accord, Clearfield Trust*, at 269: "The facts that the drawee is the United States and the laches those of its employees are not material."

The failure of the court of appeals below to adhere to the rationale of these holdings was error — error which will, absent review here, continue to recur both in litigation arising from the Penn Square receivership, and in all other commercial litigation between private citizens and government agencies within the Tenth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1985

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached, were mailed, by certified mail, with postage fully prepaid thereon, to all parties required to be served, to-wit:

Solicitor General of the United States
Office of the Solicitor General
United States Department of Justice
Washington, D.C. 20530

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B. J. ROTHBAUM, JR.